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ABSTRACT

The Family and Medical Leave Act (FMLA) is intended to protect employees' job and health benefits while they are on leave for certain family and health needs. This publication provides, in question-answer format, a description of the rights and obligations of employees and employers as stipulated by the FMLA. The report focuses on the requirements for leave when caring for a relative with a serious health condition and covers the following topics: (1) purpose of the law; (2) which employers are covered; (3) eligibility for leave; (4) reasons for leave; (5) required medical certification; (6) type and amount of leave allowed; (7) job restoration; (8) health coverage while on FMLA leave; (9) issues related to other benefits, such as retirement; (10) special rules for key employees, e.g., salaried employees who are among highest paid 10% of all employees within 75 miles of the work site; (11) notice requirements; (12) employee obligations; (13) employee protections; (14) enforcement of FMLA; (15) relation of other laws to FMLA; and (16) government resources available to help employers meet their FMLA obligations. (KDFB)

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The Family and Medical Leave Act

What it Means for Caregivers in the Workplace

◆

Questions and Answers for Employees and Employers

AARP

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Introduction to the Family and Medical Leave Act

Congress passed the Family and Medical Leave Act (FMLA) so that employees would not have to choose between their jobs and their family responsibilities. The FMLA helps employees balance the demands of the workplace with the needs of their families, strengthen the stability and economic security of families, and promote the national interest in preserving the integrity of the family. The FMLA benefits employers because of the direct correlation between stability in the family and productivity in the workplace.

The purpose of this publication is to provide information to employees and employers about their rights and obligations under the FMLA, focusing on the requirements for leave when caring for a relative with a serious health condition.

A list of Department of Labor and AARP publications resources are found on pages 13 and 14, respectively.

REMINDER

This booklet presents general information about the law and does not constitute legal advice. Because there are nuances to the law, its applicability to every situation varies. Therefore, it is important for you to seek advice about the law and its applicability to your situation.

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Purpose of the Law

What is the purpose of the Family and Medical Leave Act (FMLA)?

The purpose of the FMLA is to protect an employee's job and health benefits while on leave for certain family and health needs.

What does the FMLA require?

The FMLA requires employers to grant employees up to 12 workweeks of unpaid leave for certain family and health needs.

Does the employee returning from FMLA leave have lesser rights than other employees?

No. The employee is treated as if he or she had been working continuously.

Which Employers Are Covered?

Are all employers covered?

No.

Are private employers covered?

Yes, but only those private employers who employ 50 or more employees each workday during 20 or more calendar workweeks.

When is employer coverage determined?

As of the date the leave is requested.

Are public employers covered?

Yes. Public agencies including state and local governments and schools are covered without regard to the number of employees employed.

When did the law take effect?

For most employers, August 5, 1993.

Who Is Eligible for Leave?

Who is eligible for FMLA leave?

Employees are eligible for leave if they have been employed:

1. for at least 12 nonconsecutive months by a covered employer;
2. for at least 1,250 hours of service (paid or unpaid) during the 12-month period before leave is requested; and
3. at a worksite with at least 50 or more employees who work within 75 surface miles of their assigned worksite.

For example, an employer has worksites in New York and Boston. In New York the employer has 100 employees; in Boston the employer has 25 employees. The employees could be eligible for FMLA leave in New York, but not in Boston.

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Must employees of public agencies meet all FMLA eligibility requirements?

Yes. However, full-time teachers will be deemed to have met the 1,250-hour test, regardless of actual hours worked. Also, permanently employed teachers or those under contract are counted toward the 50 worksite employees.

Are exempt employees as defined by the Federal Labor Standards Act (FLSA) eligible for leave?

Yes.

May part-time employees be eligible for leave?

Yes, if they meet the eligibility requirements.

When must hours and months worked for employee eligibility be determined?

As of the date the leave begins. Once eligibility is favorably determined it may not be rescinded. If the employer does not determine eligibility, the employee will be deemed to be eligible.

When must the number of employees at the worksite for employee eligibility be determined?

As of the date the leave is requested. Once eligibility is favorably determined it may not be rescinded.

◆ Reasons for Leave

For what reasons must an eligible employee be granted leave?

An eligible employee is entitled to leave:

1. for the birth of a child, or placement of a child for adoption or foster care;
2. to care for an immediate family member, that is, a spouse, child, or parent, who has a serious health condition; or
3. for a serious health condition that makes the employee unable to perform any of one (or more) of his or her essential job duties.

Who is a parent?

A parent may be a biological or adoptive parent. An individual who has day-to-day responsibilities to care for and financially support a child is also considered a parent. For instance, a grandmother who raised her grandson would be considered a parent under the FMLA, even if she has no formal guardianship or similar papers. A parent-in-law is not a parent.

Who is a spouse?

A spouse is a husband or wife recognized under state law for purposes of marriage in the state in which the employee resides. An unmarried domestic partner is not a spouse.

Who is a child?

A child is a biological, adopted, or foster child, a stepchild, a legal ward, or child of a person who has day-to-day responsibilities to care for and financially support a child under the age of 18, or over the age of 18 who is incapable of self-care because of a physical or mental disability.

What is a serious health condition?

A serious health condition is:

1. an illness, injury, impairment, or physical or mental condition that requires care in a health care facility (that is, an overnight stay); or
2. continuous treatment by a health care provider, such as one of the following:
   A. a period of incapacity of more than 3 consecutive calendar days of absence from work and any subsequent treatment of that incapacity by a health care provider;
   B. continuing treatment or supervision by a health care provider for a chronic serious health condition; or
   C. any period of incapacity due to pregnancy, or for prenatal care.

Examples of a serious health condition include asthma, Alzheimer's disease, cancers, diabetes, heart ailments, pneumonia, or a severe stroke. Allergies, stress, or treatment for substance abuse may sometimes qualify as a serious health condition. Short-term illnesses such as colds or flu and cosmetic surgery would generally not be covered.

What is continuing treatment?

Continuing treatment requires two or more treatments by a health care provider, or continuing supervision by a health care provider of a long-term condition (such as Alzheimer's disease, a severe stroke, or the terminal stages of a disease).

Who is a health care provider?

A health care provider includes state-licensed health care professionals (such as physicians, dentists, psychologists, chiropractors, nurse practitioners), clinical social workers, and Christian Science practitioners.

What constitutes care of a family member?

Physical and psychological care resulting from inability of the family member to care for his or her basic needs, inability to transport himself or herself for health care, provision of comfort to the family member, or arrangement of third-party care for a family member with a serious health condition.

Medical Certification

May an employer require medical certification by a health care provider in order to support a leave request?

Yes, if an employee requests leave for his or her own serious health condition or to care for a family member with a serious health condition.

What information may be required for medical certification?

Medical certification may include the following information:

1. an explanation of the part of the definition of "serious health condition" that applies to the patient's condition and the medical facts supporting the certification;
2. date of onset and probable duration, including duration of incapacity;
3. whether an intermittent or reduced leave schedule will be necessary, and the duration of such schedule;
4. in the case of an employee's own serious health condition, the health care provider's statement of the employee's inability to perform his or her essential job functions; and
5. in the case of leave to care for a family member with a serious health condition, a statement by the health care provider of the care the patient needs, a statement by the employee of the care the employee will provide, and a time estimate of the period of care.

When must an employer request medical certification?

At the time leave is requested or within 2 business days thereafter; in the case of unforeseeable leave, within 2 business days after the leave commences, or at a later date if the employer has reason to question the appropriateness of the request for leave.

How must an employer request medical certification?

The first time an employer requests a medical certification, it must put it in writing. The employer may make requests for subsequent certifications orally.

When must an employee provide medical certification?

If an employer requests medical certification, an employee must provide it within 15 days of the receipt of the request; otherwise FMLA leave may be denied.

May the employee be required to obtain a second opinion?

Yes, but at the employer's expense, including the employee's reasonable out-of-pocket expenses. The employer may choose the health care provider to give the second opinion. Pending receipt of the second opinion, the employee is entitled to benefits under the Act.

If the first and second opinions differ, what happens?

The employer and employee must agree upon a third health care provider to issue a third and binding opinion, at the employer's expense. If the certifications do not establish the employee's entitlement to FMLA leave, the leave shall be treated under the employer's regular leave policy.

How often may certification be required?

Usually no more than every 30 days. However, for intermittent and reduced leave schedules, an employer cannot request recertification in less than the minimum period specified on the most recent certification as necessary for such schedule. For example, if a doctor certifies that an employee will need an intermittent leave schedule over three months to take chemotherapy, the employer cannot request recertification until the end of the three months.

◆ Type and Amount of Leave

What is the maximum amount of FMLA leave the employer must grant to employees?

The employer is required to grant no more than 12 workweeks of unpaid FMLA leave to an eligible employee during a 12-month period.

May an employer have a policy granting more leave than is required by the FMLA?

Yes.

How is the amount of leave calculated?

Only the amount of leave actually taken may be counted toward the maximum 12 workweeks of leave. If the employer is closed for a period of time, such as during Christmas week, no FMLA leave is charged for that week.

How much leave are part-time employees entitled to?

Part-time employees are entitled to a pro-rata amount of leave based on the amount of hours they work in a regular workweek. For instance, if an employee works 20 hours per week and the employer's workweek is 40 hours, the employee is entitled to 6 workweeks of leave.

Does leave have to be taken all at once?

No. Intermittent or reduced leave may be taken, when medically necessary, for an employee's serious health condition or the need to care for a family member with a serious health condition. For any other covered reason, it is within the employer's discretion to agree to intermittent or reduced leave.

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What is intermittent leave?

Intermittent leave is leave taken in separate blocks of time due to a single illness or injury. The minimum amount of leave charged to an employee will be the smallest amount of time the employer's payroll system uses to account for absences, provided it is one hour or less.

For example, if an employer's payroll system measures time in 15-minute increments, an employee could take leave in 15-minute increments; thus, if an employee takes one hour and 25 minutes for a doctor's appointment the employee will be charged with one hour and 30 minutes of FMLA leave.

What are the employee's obligations regarding intermittent leave?

The employee is obligated to attempt to schedule treatment in a manner that does not unduly burden the employer's operations. For instance, doctor or therapy appointments could be scheduled at the beginning or end of the day, or at lunch.

Is intermittent leave unpaid leave?

Yes, even if the employee is an exempt employee. Thus, an employee exempt under the Fair Labor Standards Act (FLSA) may be "docked" pay if he or she takes intermittent leave.

What is reduced leave?

Reduced leave reduces an employee's usual number of working hours for a period of time.

Does the employee have a right to stay in the same position when taking intermittent or reduced leave?

No. The employer may require the employee to temporarily transfer to an available alternative position that better accommodates recurring periods of leave. However, it must be a position for which the employee is qualified, that provides equivalent pay and benefits, and that complies with any collective bargaining agreement or state and federal laws. If the employer transfers the employee to a position in order to discourage the taking of FMLA leave, the employee's FMLA rights are violated. After FMLA leave is no longer needed, the employee must be transferred to the same or equivalent job he or she held before the leave commenced.

Must FMLA leave be unpaid leave?

No. FMLA leave may be all paid leave, a combination of unpaid and paid leave, or all unpaid leave.

May an employee substitute paid leave for FMLA leave?

Yes. An employee may use earned or accrued paid vacation, personal, family, or sick leave when taking leave for an employee's serious health condition or to care for a family member with a serious health condition. Sick leave may be substituted to the extent it is consistent with the employer's written policy. For example, if an employer's sick leave policy permits the use of sick leave to care for a child but not a parent, then the employer is not required to permit the use of paid sick leave to care for a parent.

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May an employer require an employee to substitute paid leave for unpaid FMLA leave?	Yes.
May an employer limit an employee's use of paid vacation or personal leave for FMLA leave?	No.
Is leave under a short-term disability plan counted toward FMLA leave?	Yes. It is considered sick or medical leave.
If paid leave is not substituted for FMLA leave, is the employee entitled to paid leave earned under the employer's plan?	Yes. For example, an employee could take unpaid FMLA leave and then take paid leave earned under the employer's vacation plan.
Who must designate leave, either paid or unpaid, as FMLA-qualifying?	The employer.
When must the employer make this designation?	At the time the employee requests or gives notice of leave, or when the employer determines that the leave qualifies as FMLA leave. The employer must notify the employee of its designation within 2 business days of the employee's notice of need for leave.
If an employee substitutes paid leave for FMLA leave, may the employer require the employee to comply with the procedural requirements of the FMLA (such as medical certification and recovery of health premiums)?	No, unless the employee takes both FMLA unpaid leave and paid leave.

◆ Job Restoration

What are an employee's rights upon returning to work?	Restoration (or reinstatement) to the same or an equivalent position with equivalent pay, benefits, working conditions, duties, responsibilities, privileges, and status.

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What happens if an employer grants an automatic pay increase for a position while the employee is on FMLA leave?

The employee is entitled to the automatic pay increase. However, pay increases granted on the basis of seniority or length of service do not have to be granted unless employees on other leave without pay receive such increases. Pay increases based on performance reviews conducted after 12 months of completed service may be delayed to account for the amount of FMLA leave taken, while increases based on annual performance reviews based on a "date of entry" anniversary date may not be denied or delayed.

Are there any exceptions to the employer's obligation to restore an employee to his or her job?

Yes. There are four exceptions:

1. an employee subject to "fitness requirements" may be required to show that he or she still meets the job qualifications (except if the employee took intermittent leave); for example, an employee may be required to show that he or she maintains a certain license or that he or she can lift 35 pounds;
2. an employer may show that the employee would have been laid off in the regular course of business;
3. an employer may show that the employee was hired to perform a specific project or for a specific term and the project or term ended while the employee was on FMLA leave; and
4. a key employee may be denied restoration if the employer shows that "substantial and grievous economic injury" would result. "Substantial and grievous economic injury" includes a threat to the economic viability of the employer as well as substantial, long-term economic injury.

◆ Health Coverage

Must an employer maintain group health coverage for an employee on FMLA leave?

Yes, on the same basis as if the employee was working. If the employee is taking unpaid FMLA leave, the employer may require the employee to pay the health plan premiums. In contrast, if the employee is taking paid FMLA leave, the employer's usual rules for continuing payment of health plan premiums govern. Also, the employer must notify the employee on FMLA leave about any opportunity to change benefits, such as the opportunity to make new elections during open enrollment periods.

Can an employer stop an employee's group health coverage?

Yes — (1) when an employee notifies the employer he or she is not returning from leave, (2) the employee fails to return to work from leave, (3) the employee exhausts FMLA leave, (4) the employer can show that the employee would have been laid off and the employment relationship would have been terminated, or (5) the employee's premium payment is more than 30 days late.

What happens if the employee is required to pay a group health plan premium and misses payment?

Absent an established longer grace period, the employer may stop health coverage if the employee's premium payment is more than 30 days late. Alternatively, the employer may pay the premium on behalf of the employee, and recover the premium amount from the employee.

What happens if group health coverage lapses due to the employee's nonpayment of premiums and the employee returns to work?

The employer must restore the employee to coverage without any qualification requirements imposed by the plan such as preexisting condition exclusions or waiting periods.

If an employee fails to return to work after the approved amount of FMLA leave, may an employer recover its portion of group health plan premiums paid during leave?

Yes, except in two limited circumstances:

1. the continuation, recurrence, or onset of the employee's serious health condition that would entitle the employee to leave under the FMLA; and
2. other circumstances beyond the employee's control, such as the unexpected transfer of an employee's spouse more than 75 miles from the employee's worksite or the layoff of an employee.

How may the employer recover the group health premiums paid on an employee's behalf if an employee does not return to work from FMLA leave?

The employer may either deduct the amount of the debt from any sums due the employee (if such deductions do not violate any applicable federal or state laws) or initiate legal action against the employee.

How long must an employee work in order to be considered to have "returned to work"?

The employee must work 30 calendar days, or retire within those 30 days.

◆ Other Benefits

What other benefits are employees entitled to when the employee returns to work from FMLA leave?

An employee is entitled to resume benefits under the same conditions and at the same level as other employees who did not take FMLA leave.

May the employee be required to requalify for a benefit?

No. If the employer has to continue to pay for benefits to prevent requalification, the employer must do so. For example, an employee may not be required to take a physical examination to requalify for life insurance.

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How is FMLA leave treated with respect to retirement plans?

Any period of unpaid FMLA leave need not be treated as credited service for purposes of benefit accrual, vesting, or eligibility to participate. However, any period of unpaid FMLA leave will not be treated as, or counted toward, a "break in service" for purposes of vesting and eligibility to participate. Thus, an employee would be in the same position after taking unpaid FMLA leave with regard to a retirement plan as if he or she had never taken the leave.

May the employee continue paying premiums for benefits such as life or disability insurance while on FMLA leave?

Yes, on the same basis that the employer permits other employees who are on leave without pay.

Does the employee accrue seniority during FMLA leave?

No.

◆ Key Employees

Are there special rules for key employees?

Yes.

Who is a key employee?

A salaried employee who is one of the highest paid 10% of all employees (salaried or nonsalaried, eligible or ineligible) within 75 miles of the worksite.

May a key employee be denied his or her job after FMLA leave?

Yes, if job restoration will cause "substantial and grievous economic injury" to the operations of the employer.

Does a key employee retain his or her rights during FMLA leave?

Yes, until the employer denies reinstatement at the end of the leave or the employee notifies the employer that he or she will not return to work.

If a key employee is denied job restoration, may the employer recover the key employee's share of health premiums?

No.

◆ Notice

Must a covered employer post notice of FMLA rights?

Yes, in places where it can be readily seen by employees and applicants, even if the employer has no eligible employees.

Must the employer post notice of FMLA rights in a language other than English?

Yes, if a significant portion of its employees are not literate in English.

Must an employer provide written guidance on FMLA leave rights and obligations?

Yes. The FMLA fact sheet available from the Department of Labor may be used.

◆ Employee Obligations

Does an employee have any obligations under the FMLA?

Yes. Those obligations are:

1. to provide 30 days advance notice to the employer if leave is foreseeable; if this is not possible, notice must be given as soon as practicable;
2. to comply with the employer's usual notice and procedure requirements for leave without pay;
3. to make a reasonable attempt, when taking intermittent leave, to arrange his or her schedule so as to not unduly disrupt the employer's operations;
4. to provide medical certification of a serious health condition if the employer requests it;
5. to report periodically on the employee's status and intent to return to work, if the employer requests it; and
6. to provide the employer with a "fitness for duty" certification if required.

What if the employee does not meet these obligations?

The employer may delay, or fail to continue, FMLA leave as long as the employee had actual notice of the obligations. Where a "fitness for duty" certification is requested, job restoration may be delayed.

May the employer waive the employee's notice obligations?

Yes.

If the employee obtains FMLA leave fraudulently, is an employee protected by the FMLA?

No.

◆ Employee Protections

May an employer retaliate against an employee for exercising his or her rights under the FMLA?

No.

May an employer interfere with FMLA rights?	No.
May the employer use the taking of FMLA leave as a negative factor in employment evaluations?	No.
May employees waive rights under the FMLA?	No.

Enforcement

What can the employee do if an employee believes that the employer has violated his or her FMLA rights?	The employee may file a complaint with the Wage and Hour Division of the U.S. Department of Labor (DOL), or a private lawsuit.
Must the complaint with DOL or a lawsuit be filed by a certain date?	Yes, within 2 years of a violation, or 3 years if the violation was willful.
What can the employee recover against an employer who violates the FMLA?	Wages, employment benefits, other compensation denied or lost, actual monetary loss sustained as a result of the violation, interest, liquidated damages for willful actions, reinstatement, the costs of the action, and reasonable attorneys' fees.
How long are employers required to maintain records under the FMLA?	3 years.

Other Laws

Does the FMLA supersede state or local laws that provide *greater* family or medical leave rights?	No.
Does the FMLA supersede an employee benefit program or a collective bargaining agreement that provides *greater* family or medical leave rights?	No.

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If an employer violates both the FMLA and a discrimination law, may an employee recover under both laws?

Yes.

If an employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently, exhausts FMLA leave, and still is unable to return to work, does the employee still have FMLA protection?

No. The employee must look to the workers' compensation law or the Americans with Disabilities Act for any relief or protection.

Government Resources

The specific interpretation and application of the Family and Medical Leave Act is certain to be refined and modified as it is put into practice, and as the courts interpret the statute and regulations. Readers of this publication will want to update themselves periodically on the specific requirements of the law.

In addition, upon request, the Department of Labor will send employers a package of materials to help employers meet their obligations under the FMLA. This package of materials includes a compliance guide, a workplace poster describing employee rights under the law, a medical certification form, and an employer checklist describing eight pieces of information employers must give employees about the law.

For a copy of this package or the most recent information on the FMLA, contact the Wage and Hour Division of the U.S. Department of Labor, Employment Standards Administration, 200 Constitution Avenue, N.W., Washington, DC 20210.

AARP Resources on Caregiving

Caregiving: A Money Management Workbook (D13855)

Care Management: Arranging for LTC (D13803)

Miles Away and Still Caring (D12748)

Staying at Home: A Guide to Long Term Care (D14986)

To order a free copy of any of these publications, or additional copies of this guide, write to

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AARP is the nation's leading organization for people age 50 and over. It serves their needs and interests through legislative advocacy, research, informative programs, and community services provided by a network of local chapters and experienced volunteers throughout the country. The organization also offers members a wide range of special membership benefits, including *Modern Maturity* and the monthly *Bulletin*.

AARP's Work Force Programs Department is educating employers, employees, and the general public about retirement and employment issues affecting older workers. Through its programs, publications, and volunteer activities, the Department strives to achieve the following goals:

- To assist employers to recruit, manage, train, and retain an aging and increasingly more diverse work force;
- To help empower persons to make informed employment and retirement decisions;
- To advocate the enforcement of nondiscriminatory rules, policies, and practices related to age in the workplace; and
- To develop innovative programs and models that will increase the work options available to older persons.

◆ Worker Equity

Worker Equity seeks to increase understanding and enforcement of age discrimination, employee benefits, and disability laws. Worker Equity files amicus curiae (friend-of-the-court) briefs, monitors and initiates litigation, provides guidance to individuals and technical assistance to attorneys, and educates individuals and employers.

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